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For Opinion See 2006 WL 2524094, Fed. Sec. L. Rep. P 93,844

United States District Court, M.D. Tennessee.
Tim JOHNSON, Plaintiff,
v.
THE SONGWRITER COLLECTIVE, LLC, E. Jean Mason, Bud Carr, Chuck McNeal, Robert D'Loren, and Fortress Credit Opportunities I, LP, Defendants.
Civil Action No. 3:05-0320.
July 1, 2005.

Memorandum of Law in Support of the Motion to Dismiss of Defendant Fortress Credit Opportunities I, LP

Judge Trauger.
Magistrate Judge Griffin.

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Defendant Fortress Credit Opportunities I, LP, ("Fortress"), respectfully submits this memorandum of law in support of its motion to dismiss all claims in Plaintiff Tim Johnson's Complaint asserted against Fortress (Count I, Count V and Count VI),[FN1] pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP")

FN1. Counts II-IV and Counts VII-VIII are not alleged against Fortress and are therefore not addressed in this Motion to Dismiss.

PRELIMINARY STATEMENT

Tim Johnson ("Johnson" or "Plaintiff") seeks to reverse his decisions in December of 2003 to join The Songwriter Collective, LLC (the "Collective") and to convey his Catalog so that it could be used to secure a $12 million loan made by Fortress The asserted factual basis for this relief is that the Collective and its agents -- not Fortress -- made certain misrepresentations and were guilty of mismanagement. As the allegations in the Complaint make clear: (1) Fortress had nothing to do with any of the fraud, misrepresentations or mismanagement alleged by Johnson; (2) Fortress's only connection to this dispute is a $12 million loan it provided to the Collective to fund its operations; (3) Johnson assigned all right, title and interest in his catalog -- the intellectual property rights to Johnson's musical compositions, including all copyrights and associated royalty revenue income streams ("Catalog") -- to the Collective with the knowledge that it would serve as collateral for the $12 million loan from Fortress; and (4) as a bona fide purchaser, Fortress's loan to the Collective was made in exchange for promised repayment and a security interest in the Collective's intellectual property rights, including Johnson's Catalog Despite these facts, Johnson now seeks to deprive Fortress of its rights to that collateral. Whatever the merit of Johnson's claims against the Collective and its agents, there is no legal or equitable basis for invalidating the rights Fortress holds in the collateral provided in return for its $12 million loan.

STATEMENT OF FACTS[FN2]

FN2. On May 24, 2005, Johnson filed an amended complaint (the "Complaint") against Fortress and other defendants, alleging essentially the same claims set forth in the original complaint Johnson filed on April 21, 2005. Solely for the purposes of this motion, we accept as true the facts alleged in the Complaint.

Beginning in or about November or December of 2003, Johnson was solicited to participate in the Collective, a Delaware limited liability company formed for the purpose of operating a music publishing company owned by and run for the benefit of its members Compl. at ¶ 11-12; Jarrett Aff., Ex. A at § 2.4.[FN3] Songwriters who were interested in becoming members of the Collective were required to sign the

Collective's Amended and Restated Limited Liability Company Agreement (the "LLC Agreement") Compl. at ¶ 17; Jarrett Aff., Ex. A. Interested songwriters were also required to enter into a subscription agreement with the Collective whereby they agreed to assign, sell, transfer and convey their respective catalogs (the intellectual property rights to a songwriter's compositions) to the Collective. Compl. at ¶? 12-13, 16; Jarrett Aff., Ex. B at p. 8.

> FN3. The Court may consider the extrinsic documents attached to the Affidavit of Roderick Jarrett for the purposes of deciding this Motion to Dismiss because the documents' contents are alleged in the Plaintiff's Complaint and/or the documents attached to Fortress's Motion to Dismiss are referred to in Plaintiff's Complaint and are central to Plaintiff's claim *See Latimer v. Robinson*, 338 F Supp. 2d 841, 843 (M D. Tenn. 2004) (explaining the standard for allowing extrinsic documents to be considered on a motion to dismiss and granting motion to dismiss based upon documents attached to defendant's motion to dismiss that were outside the pleadings).

In connection with becoming a member of the Collective, Johnson executed a subscription agreement with the Collective on December 12, 2003 (the "Subscription Agreement"). Compl at¶16; Jarrett Aff., Ex. B. Pursuant to the Subscription Agreement, Johnson transferred all right to, and interest in, his Catalog to the Collective Johnson also executed the LLC Agreement, on or about December 12, 2003. Compl at 1 17; Jarrett Aff., Ex. A.

Under the terms of the Subscription Agreement with the Collective, Johnson specifically agreed to:
assign, sell, transfer and convey to the [Collective], all right, title and interest [belonging to Johnson] ... in all of the Compositions... set forth on Schedule A, including, without limitation, all titles, words and music thereof, any and all copyrights (whether registered or unregistered), whether any of the foregoing items is now or hereafter owned beneficially or of record and whether now or hereafter owned individually, jointly or otherwise, and in connection with all of the foregoing, all other applications and other pending items, all income, accounts, license royalties, general intangibles and other payment intangibles, any and all claims or causes of action whether asserted or not relating thereto, any and all future income streams emanating therefrom, all proceeds of infringement suits and other proceeds, all rights to sue for past, present and future infringement, all rights corresponding thereto throughout the world, and any and all reissues, divisions, continuations, renewals, extensions, derivative works and other rights of copyright thereof, all in the [Collective's] and/or [Johnson's] name (including without limitation, during the pendency of any bankruptcy-related proceeding), together, in each case, with all products and proceeds thereof, all collections, payments and other distributions and realizations with respect thereto, any and all other rights, powers, privileges, remedies and interests of [Johnson] therein, thereto or thereunder.

Jarrett Aff., Ex. B at § 1.3

Johnson's Catalog, which Johnson transferred to the Collective pursuant to the terms of the Subscription Agreement, is set forth fully on Schedule A of the Subscription Agreement. Schedule A, containing Johnson's notarized signature to the copyright assignment, includes a single paragraph, in which Johnson specifically acknowledged and agreed to:

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the undersigned, [Johnson] does hereby assign, sell, transfer, and convey to The Songwriter Collective, LLC, and its successors and assigns ("Assignee"), all rights now known, or which may hereinafter come into existence, in each of the musical compositions (the "Compositions") set forth on Schedule A hereto including, without limitation, the title, words and music, any and all registered copyrights relating thereto or the full light to secure copyright registrations therein to any unregistered Compositions, and all renewal and extension rights of copyright thereof, worldwide, all in [Johnson's] name, any and all claims or causes of action whether asserted or not relating thereto and any and all current or future income streams emanating therefrom

Jarrett Aff., Ex. B at Schedule A

Under the terms of the Subscription Agreement, Johnson also agreed and acknowledged that Johnson's Catalog would "be used as collateral by the [Collective] in order to secure interim financing to cover its operations" Jarrett Aff., Ex B at p. 1; Compl. at ¶ 16. On February 13, 2004, Johnson also executed an amendment to the LLC Agreement (the "Amendment"), further agreeing to allow his Catalog to be pledged as collateral for the Fortress Loan Agreement. Compl at ¶ 26,

On or about March 1, 2004, after obtaining the assignments of various catalogs from its members, including Johnson, the Collective obtained a $12 million loan from Fortress by executing the Fortress Loan Agreement. Compl at ¶ 27 The Fortress Loan Agreement was collateralized "by Johnson's Catalog" (as well as in and over the catalogs of other Collective members) Compl. at¶29 By signing the Amendment to the LLC Agreement, Johnson acknowledged his awareness of the Fortress Loan Agreement and pledged his Catalog as collateral to secure that loan Compl. at ¶ 26

The security interest Fortress obtained in Johnson's Catalog is set forth in the Copyright Mortgage and Security Agreement, dated as of March 1, 2004 (the "Copyright Mortgage") between Fortress and the Collective Jarrett Aff., Ex. C. The Copyright Mortgage grants Fortress a copyright mortgage in the compositions contributed to the Collective by each of its members and a security interest and right to the royalties generated by those compositions. *Id.* Fortress's only contractual relationship under the Fortress Loan Agreement and related agreements is with the Collective. *See* Jarrett Aff, Exs. A-C.

In or about November 2004, after the Collective had defaulted under the terms of the Fortress Loan Agreement, Fortress threatened to foreclose and to take possession of Johnson's Catalog interest Compl at ¶ 33. Despite Johnson's knowledge of Fortress's right and intention to foreclose on the Fortress Loan Agreement, Johnson did not attempt to exercise his "Put Right" -- the right contained in the LLC Agreement whereby Johnson, within one year of the execution of the LLC Agreement, could pay certain amounts in order to receive a reconveyance of his Catalog -- and Johnson never informed the Collective or Fortress that he intended to exercise his Put Right *See generally* Compl. Moreover, pursuant to Section 11 2 of the LLC Agreement, the Collective, not Fortress, has the sole ability and responsibility to administer the exercise of a member's "Put Right" Jarrett Aff., Ex. A at § 11.2 Johnson claims that the Put Right was illusory because the deal with Fortress did not provide for the exercise of the Put Right Compl. at ¶ 29. However, Section 15 of the Copyright Mortgage clearly provides the Collective with the right to obtain a release of Johnson's Catalog through exercise of a membership

buyout: the Put Right. Jarrett Aff, Ex C at § 15; *see also* Jarrett Aff., Ex. A at § 11.2.

On January 6, 2005, Fortress exercised its right to accelerate the Fortress Loan Agreement, stating: "Fortress hereby provides the [Collective] written notice of [Fortress's] exercise of its right to accelerate and declare all of the Obligations (as defined in the Loan Agreement) immediately due and payable. Compl at ¶ 35; Jarrett Aff., Ex. D. Due to Fortress's Notice of Acceleration, Fortress "is currently in a position to foreclose on the Bridge Loan and to take possession of Johnson's [Catalog]." Compl at ¶ 35

The Complaint does not, and cannot, allege that Fortress bleached any of its obligations under the Fortress Loan Agreement, and the Complaint does not dispute that the Collective is in breach of its obligations under the Fortress Loan Agreement The Complaint also lacks any factual allegations showing that Fortress was anything more than a lender, The only factual allegations Plaintiff makes against Fortress are:

- Using Johnson's Catalog as collateral, the Collective obtained a bridge loan from Fortress, pursuant to which Fortress provided the Collective with the funds necessary to fund its operating costs until it could securitize the catalogs of its members Compl. at 1 27.
- Fortress knew or should have known of the Put Right through its due diligence review of the Transactional Documents in connection with issuance of the Fortress Loan Agreement. *Id.* at ¶ 29
- In or about November 2004, Fortress threatened to foreclose on the Fortress Loan Agreement and to take possession of Johnson's Catalog. *Id.* at ¶ 33.
- In January 2005, Fortress sent a Notice of Acceleration to the Collective relating to the Fortress Loan Agreement. Accordingly, Fortress is currently in a position to foreclose on the Fortress Loan Agreement and to take possession of Johnson's Catalog *Id.* at ¶ 35.

Based solely upon the factual allegations set forth above, Johnson asserts three claims against Fortress: (i) declaratory relief that Johnson owns his Catalog flee and clear of Fortress's security interest (Count I); (ii) rescission and reformation of various agreements including the Fortress Loan Agreement (Count V); and (iii) recovery against Fortress for unjust enrichment (Count VI). In essence, Johnson seeks to invalidate Fortress' security interest without asserting any facts or legal theory that would entitle him to do so. The basis of the instant motion is that even if Johnson were misled and defrauded by the Collective into conveying his Catalog, Fortress acquired a security interest in the Catalog that cannot be set aside under any conceivable legal theory

ARGUMENT

Fortress moves to dismiss all claims against it under Fed. R.Civ.P. 12(b)(6) for failure to state a claim against Fortress. Assuming the truth of the factual allegations asserted in the Complaint -- and there are none that suggest that Fortress participated in any of the alleged misrepresentations or mismanagement -- Fortress is entitled to have all claims against it dismissed as a matter of law.[FN4]

FN4. "To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory more

[information] than bare assertions of legal conclusions is ordinarily required to satisfy federal notice pleading requirements" *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n.*, 176 F.3d 315, 319 (6th Cir 1999) (quotations omitted) (affirming 12(b)(6) dismissal of plaintiff's claims); *see also Begala v. PNC Bank, Ohio, N.A.*, 214 F.3d 776, 779 (6th Cir 2000) (reaffirming the standard that bare assertions of legal conclusions are insufficient to survive a 12(b)(6) motion to dismiss) "Legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness" *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F 2d 802, 810 (6th Cir 1988) (citing 2A Moore's Federal Practice ¶ 12 07 [2 -5] (2d ed 1987)).

I. COUNT I SEEKING DECLARATORY RELIEF AGAINST FORTRESS MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM

Johnson seeks a declaration, in relevant part, that (i) the LLC agreement is null, void, and unenforceable, and (ii) any alleged interest in Johnson's Catalog by any of the defendants, including Fortress, is null and void. Compl. at ¶m 38-39. Johnson makes this claim despite the fact that Johnson executed the Subscription Agreement -- representing that he had fully assigned, sold, transferred and conveyed his Catalog to the Collective (Jarrett Aff., Ex. B) -- and the acknowledged fact that he actually "pledged his Catalog Interest as collateral for the [Fortress Loan Agreement]" (Compl. at ¶ 26). Fortress loaned the Collective more than $12 million in exchange for promised repayment with interest and secured the loan with the Collective's intellectual property rights, including Johnson's Catalog. Therefore, the Collective's transfer of Johnson's Catalog to Fortress is valid and enforceable without regard to any remedy he may be granted as to the Collective *See infra* at § I(B).

A. The LLC Agreement Is Voidable, Not Void

As a preliminary matter, even assuming, *arguendo,* that Johnson's allegations that he was fraudulently induced by others into signing the LLC Agreement are true, the LLC Agreement is not void, but only voidable *See, e.g., Sims v. Banks of Commerce & Trust Co.*, 14 Tenn. App 672, 681 (Ct App 1932) ("Even a contract obtained by fraud, coercion and undue influence is voidable, not void."); *Williams v. Spinks*, 7 Tenn. App 488, 1928 WL 2041, at *5 (Ct App, 1928) ("A contract obtained by fraud is not void but simply voidable."); *see also* Restatement 2d of" Contracts § 7 cmt a ("Typical instances of voidable contracts are those ... where the contract was induced by fraud, mistake, or duress ....")

B. The LLC Agreement Cannot Be Voided Because Fortress, As An Intervening Third-Party, Possesses An Enforceable Security Interest In Johnson's Catalog.

Johnson's attempt to obtain a declaratory judgment that voids the LLC Agreement and makes declarations relating to Defendants' alleged lack of interest in Johnson's Catalog fails because -- regardless of whether Johnson was fraudulently induced to enter into the LLC Agreement -- Fortress has an intervening security interest in Johnson's Catalog (*see* Jarrett Aff., at Ex. C). Defrauded parties may exercise their option to treat a contract as voidable *only* "in the absence of intervening rights of innocent third parties." *Richardson v. Vick*, 125 Tenn. 532, 540, 145 S.W. 174, 176 (1911); *see also In re Delorenzo,* 1980 Bankr. LEXIS 4193, at *17 n 1 (Bankr M.D. Tenn Oct. 31, 1980) (finding that "the right to avoid a contract induced by fraud must be exercised before the lights of third parties have

intervened"); *In re Bell & Beckwith*, 112 B.R. 858, 862 (N D. Ohio 1990) (holding that a voidable contract "may be rescinded *before the rights of third parties have intervened")* (emphasis added).

Johnson recognizes that the rights of Fortress have intervened because Johnson asserts in his Complaint that he "pledged his Catalog Interest as collateral for the [Fortress Loan Agreement]." Compl. at ¶ 26. Fortress was not a party to the LLC Agreement and, indeed, Fortress's only connection to the case at hand is the $12 million loan that it made to the Collective Compl. at ¶ 27 Thus, Johnson cannot void the assignment, sale, transfer and conveyance of his Catalog to the Collective because Fortress's rights have intervened by reason of the Fortress Loan Agreement and the Copyright Mortgage.

C. Johnson's Claim for Declaratory Relief Also Fails As a Matter of Law Because Fortress Is a Secured Party Under Article 9 of Tennessee's Uniform Commercial Code

Due to the execution of the Copyright Mortgage as part of the Fortress Loan Agreement (*see* Jarrett Aff., Ex, C), Fortress has an enforceable security interest in Johnson's Catalog Under Tennessee law, a "security interest is enforceable against the debtor and third parties with respect to the collateral" where three requirements are met: "(1) value has been given; (2) the debtor has lights in the collateral or the power to transfer rights in the collateral to a secured party; and" (3) one of several conditions is met, including that "the debtor has authenticated a security agreement that provides a description of the collateral." Tenn. Code Ann § 47-9-203

All three requirements have been satisfied in this case. First, Fortress gave value - in the form of a $12 million loan to the Collective pursuant to the Fortress Loan Agreement -- and thus satisfies the first prong of the Section 9-203 requirements. Additionally, the Collective as debtor obviously "has authenticated a security agreement that provides a description of the collateral," Tenn Code. Ann § 47-9-203(3), since it executed a Copyright Mortgage giving Fortress a security interest in, and setting forth a description of, the collateral, *i.e.*, the compositions contributed to the Collective and the royalties generated by those compositions Jarrett Aff., Ex. C.

Finally, the Collective as debtor "ha[d] rights in the collateral or the power to transfer rights in the collateral to a secured party" and/or "power to transfer rights in the collateral to a secured party" Tenn Code. Ann § 47-9-203(3) Even assuming, *arguendo,* that the LLC Agreement was voidable, the Collective had lights in the collateral sufficient to transfer a security interest to Fortress. A person with voidable title has the power to transfer a security interest in the collateral to a secured party *See, e.g.*, *Kunkel v. Sprague Nat'l Bank*, 128 F 3d 636, 642, 643 (8th Cir. 1997); *Ledbetter v. Darwin Dobbs Co.*, 473 So 2d 197, 202 (Ala. Civ. App 1985) (reversing summary judgment against bank where bank received security interest in vehicle from individual with voidable title); *Central Nat'l Bank of Mattoon v. Worden-Martin, Inc.*, 413 N.E.2d 539 (Ill App. Ct 1980) (bank perfected its security interest through proper filing, where bank had repossessed car from individual who took possession of the vehicle through credit sale but never paid for it); *of. McFarland v. Ford Motor Credit Co.*, 112 B.R. 906, 910 (Bankr. E D Tenn 1990) (noting that according to most courts, " 'rights in the collateral' encompass almost any rights in the collateral that a debtor may have"); *In re: Coupon Clearing Svc., Inc.*, 113 F.3d 1091, 1103 (9th Cir. 1997) ("Where a debtor has

rights to collateral beyond naked possession, a security interest may attach to such rights.")

Indeed, "[t]he consent of the true owner of the collateral is enough to give the debtor rights in the collateral for purposes of § 9-203" *In re: Pubs, Inc. of Champaign,* 618 F 2d 432, 436 (7th Cir. 1980). *Cf. Peterson v. First Tennessee Bank,* 1985 Tenn. App. LEXIS 3059, at *22 (Tenn Ct App. July 30, 1985) (equipment in question could be used by defendant to satisfy debt of debtor, where plaintiff had signed a note allowing debtor to use equipment in question as collateral).

Johnson voluntarily transferred rights to his Catalog to the Collective Indeed, Johnson's signature on Schedule A of the Subscription Agreement is immediately preceded by the following evidence of voluntary transfer:
For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the undersigned .. does hereby assign, sell, transfer and convey to The Songwriter Collective, LLC, and its successors and assigns ... all rights now known, or which may hereinafter come into existence, in each of the musical compositions ... set forth on Schedule A hereto including, without limitation, the title, words and music, any and all registered copyrights relating thereto or the full right to secure copyright registrations therein to any unregistered Compositions, and all renewal and extension rights of copyright thereof, worldwide all in Assignor's name, any and all claims or causes of action whether asserted or not relating thereto and any and all current or future income streams emanating there from

Jarrett Aff., Ex. B. at 8.

Moreover, the Collective had lights in the collateral and/or the power to transfer rights in the collateral because Johnson consented to the Collective's use of his Catalog as collateral Compl. at¶26. There can be no question that Johnson *knew* that the Collective would be employing his Catalog as collateral in favor of a lender such as Fortress because he acknowledged (on the first page of the Subscription Agreement) "that the Catalog and/or Rights to Income being transferred to the Company *will be used as collateral by the Company in order to secure financing* to cover its operations and any day-to-day expenses up to and until the Initial Loan Closing." Jarrett Aff., Ex. B at 1(emphasis added). Johnson's awareness that his Catalog would be pledged to Fortress is also evidenced by his execution of the "Amendment" on February 13, 2004, in which he explicitly agreed to allow his Catalog to be pledged as collateral for the Fortress Loan Agreement Compl at ¶ 26

Thus, regardless of whether Johnson was fraudulently induced by others to enter into the LLC Agreement, Johnson voluntarily assigned and transferred his Catalog to the Collective, which in turn granted an enforceable security interest in Johnson's Catalog to Fortress. The Complaint does not set forth any facts to support an argument that Fortress's rights in the Catalog have been obstructed in any way. Consequently, Johnson's claim for a declaratory judgment must be dismissed as against Fortress.

II. COUNT V FOR RESCISSION AND REFORMATION MUST BE DISMISSED AGAINST FORTRESS TO THE EXTENT THAT SUCH RESCISSION OR REFORMATION WOULD IMPACT FORTRESS'S SECURITY INTEREST OR OTHER RIGHTS UNDER THE FORTRESS LOAN AGREEMENT

Count V seeks rescission of the LLC Agreement and other documents purporting to

bind Johnson to the obligations the Collective made pursuant to the Fortress Loan Agreement. Compl at m¶ 64-69. Johnson would have this Court require Fortress to return its collateral for the Fortress Loan Agreement without receiving a return of the funds it loaned the Collective. Johnson also seeks to have the LLC Agreement and Subscription Agreement rescinded notwithstanding the fact that Fortress relied upon those agreements when it entered into the Fortress Loan Agreement. However, those agreements cannot be rescinded because Fortress has rights to Johnson's Catalog as an intervening secured party *See supra* at § I

Plaintiff's claim should also be dismissed "[b]ecause the relationship between [Fortress and the Collective] was established by the [Fortress Loan Agreement], and the agreement specifies that it should be governed by the laws of New York, that state's laws should apply..." *Chase Manhattan Bank v. CVE, Inc.*, 206 F. Supp 2d 900, 907 (M.D. Tenn 2002) (holding that claim for rescission of contract should be governed by New York law where agreement between contracting parties specified that New York law would govern) Under New York law, Johnson's claim for rescission fails as a matter of law because (i) rescission of the agreements which pledged Johnson's Catalog to the Collective and provided Fortress a security interest in Johnson's Catalog would not place the parties back in the status quo; (ii) Fortress would be prejudiced by rescission or reformation of the Fortress Loan Agreement, the LLC Agreement and/or the Subscription Agreement, insofar as the rescission or reformation of those agreements interferes with Fortress's security interest in Johnson's Catalog; and (iii) Johnson lacks standing to rescind the Fortress Loan Agreement *See infra* at pp. 13-14

As an initial matter, to the extent that Johnson seeks to rescind the Fortress Loan Agreement, the LLC Agreement, or the Subscription Agreement, Johnson's claim for rescission must be dismissed as to Fortress because in order to rescind an agreement "there must be no prejudice to the adverse party and the rescission must put the parties back into status quo" *See* CVE, 206 F Supp 2d at 909 (*citing Broadway-111th St. Assoc. v. Morris*, 160 A.D.2d 182, 184, 553 N.Y S 2d 153 (N.Y App. Div. 1990)) Here, Fortress would be extremely prejudiced by rescission of the various agreements which pledge Johnson's Catalog as collateral for the Fortress Loan Agreement because the Collective is currently in default of the Fortress Loan Agreement and has no ability to return to Fortress the $12 million Fortress loaned to the Collective in consideration for that agreement.

Johnson clearly fails to allege that the parties could be put back into the status quo. Instead, what Johnson attempts to do is to rescind various agreements which involve Fortress's security interest in Johnson's Catalog without a corresponding return of the $12 million Fortress loaned the Collective. Compl at p. 27. Johnson's rescission claim fails as a matter of law because in order to rescind a contract, the parties must be put back into the status quo. *Rudman v. Cowles Communications, Inc.*, 30 N.Y.2d 1, 13-14, 280 N E.2d 867, 874 (N Y. 1972) (dismissing rescission claim because rescission may only be invoked when there is no complete and adequate remedy at law and where status quo may be substantially restored, dismissing fraud claim and awarding damages for breach of employment agreement). *See also Singh v. Carrington*, 2005 NY. App Div. LEXIS 5840, at *4 (2d Dep't May 31, 2005) (stating "Rescission is not appropriate where, as here, the status quo cannot be 'substantially restored' ") *Accord A. Landreth Co. v. Schevenel*, 102 Tenn. 486, 492, 52 S W 148, 149 (Tenn. 1899) (stating that "It is an elemental principle, as applicable to rescission of contract or settlement, by fraud or otherwise, that upon rescission the parties must be put in status quo"); *Ingram v. Beazer Homes Corp.*, 2003 Tenn. App. LEXIS 239, at *16-17 (Tenn. Ct. App 2003) (reversing trial

court's rescission of contract for sale of home because remedy unavailable if the parties cannot be placed in status quo)

Second, to the extent to which Johnson has named Fortress as a patty in seeking rescission of the LLC Agreement and the Subscription Agreement, Fortress is not a party to those agreements and therefore cannot be named as a party for rescission *See McGarry v. Miller,* 158 A D.2d 327, 328, 550 N.Y.S 2d 896, 897 (1st Dep't 1990) (holding that no cause of action for rescission could be alleged against defendant, who "was not a party to the contract") More importantly, Fortress would be prejudiced by a rescission of the LLC Agreement and/or the Subscription Agreement insofar as such rescission interferes with Fortress's security interest in Johnson's Catalog Therefore, any rescission or reformation of those agreements that would effect Fortress's security interest in Johnson's Catalog is improper under applicable law because Fortress has secured rights as an intervening third-party. *See supra* at § I

Finally, Johnson cannot seek to rescind agreements, like the Fortress Loan Agreement, to which he is not a party because "only a party or one privy to a contract may sue for rescission or cancellation." *Frymer v. Bell,* 99 A D.2d 91, 96, 472 N.Y.S.2d 622, 625 (1st Dep't 1984); *see also Freidus v. Sardelli,* 192 A D.2d 578, 580, 595 N Y. S.2d 981, 983 (2d Dep't 1993) (same); *McGarry v. Miller,* 158 A D 2d 327, 328, 550 N Y. S.2d 896, 897 (1st Dep't 1990) (same); *Grossman v. Herkimer County Indus. Dev. Agency,* 60 A.D.2d 172, 180, 400 NY S.2d 623, 627 (4th Dep't 1977) (same).

III. PLAINTIFF'S UNJUST ENRICHMENT CLAIM (COUNT VI) MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM AGAINST FORTRESS

Count VI of the Complaint seeks damages against Fortress for Unjust Enrichment and claims that Fortress -- which made a $12 million loan in part secured by Johnson's Catalog -- has been unjustly enriched by attainment of a security interest in Johnson's Catalog. Compl. at ¶¶ 70-74. Johnson's claim must be dismissed because "[t]o state a claim for unjust enrichment, the Plaintiff must demonstrate: (1) a benefit conferred upon the defendant by the plaintiff, (2) appreciation by the defendant of such benefit, and (3) acceptance of such benefit without payment of the value thereof." *Chase Manhattan Bank v. CVE, Inc.,* 206 F.Supp.2d 900, 909 (MD. Tenn. 2002) (finding no unjust enrichment and granting a motion to dismiss, in part, because the parties made an agreement and performed according to the terms of that agreement). *See also Paschall's, Inc. v. Dozier,* 219 Tenn. 45, 53, 407 S.W.2d 150, 154 (1966) (establishing the modern Tennessee rule on unjust enrichment); *Beaudreau v. Larry Hill Pontiac/Oldsmobile/GMC, Inc.,* 160 S.W.3d 874, 882 (Tenn. Ct App. 2004) (applying *Paschall's* unjust enrichment test and granting motion to dismiss because plaintiff failed to properly allege acceptance of a benefit without payment of the value thereof).

A. Johnson's Unjust Enrichment Claim Must Be Dismissed Because the Collective, Not Johnson, Granted Fortress a Security Interest in Johnson's Catalog

Where defendant's alleged benefit does not directly flow from the plaintiff, no claim for unjust enrichment will stand; an indirect benefit does not qualify as a benefit for purposes of a cause of action for unjust enrichment. *Black v. Boyd,* 248 F.2d 156, 162 (6th Cir 1957) (denying claim for unjust enrichment because the payment of the money which plaintiff sought to recover was not made by plaintiff to

the defendant, but was made to a third party); *Leeper v. Cook*, 688 S W 2d 94, 96 (Tenn. Ct App. 1985) (dismissing unjust enrichment claim since "no obligation arose between the patties because there is no privity nor transactions between the parties establishing a basis for either a legal or equitable obligation"); *Indymac Mortg. Holdings, Inc. v. Kauffman*, 2001 Tenn App. LEXIS 954, at *13-14 (Tenn Ct App 2001) (stating "a claim for unjust enrichment requires a legal or equitable obligation arising from some type of privity or transaction between the parties"). *See also In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 9585, at *44-45 (D D.C. 2001) (dismissing plaintiff's claims for unjust enrichment based upon the lack of facts supporting a finding of a direct benefit conferred upon defendants by plaintiff)

Fortress has not appreciated any benefit directly from Johnson Johnson assigned his Catalog to the Collective under the terms of the Subscription Agreement. Compl. at 16 The Collective thereafter granted Fortress a security interest in Johnson's Catalog in exchange for Fortress's loan pursuant to the Fortress Loan Agreement. *Id.* at I¶ 16, 27. Johnson had no contract or direct contact with Fortress and there is therefore no basis for Johnson to assert an unjust enrichment claim against Fortress, having failed to confer a direct benefit on Fortress

B. Johnson's Claim For Unjust Enrichment Must Be Dismissed Because Fortress Paid $12 Million For Its Security Interest In the Catalogs Assigned To the Collective By Its Members, Including Johnson's Catalog

Tennessee law clearly states that the "most significant requirement for a recovery on quasi contract is that the enrichment to the defendant be unjust." *Paschall's*, 407 S.W 2d 155. Defendant Fortress would not be unjustly enriched here because Fortress loaned the Collective $12 million and the Collective has defaulted on that loan. Where as here, the defendant has paid value for the benefit conferred, a claim for unjust enrichment fails as a matter of law. *See John J. Heirigs Constr. Co. v. Exide*, 709 S W 2d 604, 607 (Tenn. Ct. App 1986) (holding that the subcontractor was not entitled to recover damages for unjust enrichment because the defendants had paid the entire amount due to the contractors with whom the contract was made).

Plaintiff fully admits in his Complaint that by signing the Amendment to the LLC Agreement, he was aware that he was pledging his Catalog as collateral for the Fortress Loan Agreement. Compl at ¶ 26. However, he now argues that even though the Collective is in default, it would be unjust for Fortress to foreclose on his pledged Catalog. Compl. ¶ 70-74 Such an allegation violates the requirement that there be acceptance of a benefit without payment of the value thereof *See Paschall's*, 219 Tenn at 56, 407 S.W.2d at 155. Here, Fortress loaned the Collective $12 million and Johnson was aware of, and consented to, the use of his Catalog as collateral to secure the Fortress Loan Agreement. Compl. at ¶¶ 16, 26-27 Therefore, as a matter of law, Johnson's claim against Fortress for unjust enrichment fails. *See Whitehaven Cmty. Baptist Church v. Holloway*, 973 S.W.2d 592, 596-97 (Tenn. 1998) (holding that it was not unjust for defendants to retain possession of property and improvements thereto for which they provided consideration and dismissing unjust enrichment claims); *Heirigs*, 709 S.W 2d at 607 (stating that because defendants paid the full contract price for the improvements to the property, "under no stretch of the imagination could it be said that the defendants were unjustly enriched nor could it be said that equity demands that defendants be required to pay twice")

CONCLUSION

For all of the foregoing reasons, Fortress respectfully requests that this Court enter an order dismissing all Counts of the Complaint asserted by Plaintiff insofar as they concern Fortress.

Tim JOHNSON, Plaintiff, v. THE SONGWRITER COLLECTIVE, LLC, E. Jean Mason, Bud Carr, Chuck McNeal, Robert D'Loren, and Fortress Credit Opportunities I, LP, Defendants. 2005 WL 2483902 (M.D.Tenn.)

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